

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

2016 MAR 16 AM 8:31

RECEIVED

Docket No. 14-0151

In re:

INDIAN CREEK ENTERPRISES, INC., a Texas corporation;
THOMAS C. SCHOOLER, an individual; and
KYLE HAY, an individual;

Respondents.

**DECISION AND ORDER BY ENTRY OF DEFAULT
AGAINST KYLE HAY**

Preliminary Statement

The instant matter involves a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter "Act" or "AWA"], and the regulations and standards promulgated thereunder (9 C.F.R. § 1.1 *et seq.*) [hereinafter "Regulations"]. The proceeding initiated with a Complaint filed by the Administrator, Animal and Plant Health Inspection Service [hereinafter "APHIS"], of the United States Department of Agriculture [hereinafter "USDA"; "Complainant"], alleging that Indian Creek Enterprises, Inc., a Texas corporation [hereinafter "Respondent Indian Creek" or "Indian Creek"]; Thomas C. Schooler, an individual [hereinafter "Respondent Schooler" or "Thomas Schooler"]; and Kyle Hay, an individual [hereinafter "Respondent Hay"] [hereinafter collectively referred to as "Respondents"] committed multiple violations of the Act.

Issues

1. Whether default should be entered in this matter;
2. Whether Respondent Hay willfully violated the Act; and
3. Whether the sanctions recommended by Complainant should be imposed.

Statement of the Case

I. Procedural History

On July 7, 2014, Complainant filed with the Hearing Clerk, Office of Administrative Law Judges [hereinafter "OALJ"; "Hearing Clerk"], a Complaint alleging willful violations of the Animal Welfare Act and Regulations. On July 8, 2014, the Hearing Clerk sent each Respondent, via certified mail, the Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.130 *et seq.*) [hereinafter "Rules of Practice" or "Rules"].

The certified mailing to Respondent Hay was returned as "unclaimed" on August 5, 2014 (USPS Receipt No. 7003101000173674992). Accordingly, the Hearing Clerk re-sent copies of the Complaint and Rules to Respondent Hay by regular mail on August 13, 2014.¹ Per section 1.136 of the Rules of Practice (7 C.F.R. § 1.136(a)), Respondent Hay was required to file an answer within twenty days after service of the Complaint; thus, Respondent Hay had until September 2, 2014 to respond. Respondent Hay did not file an answer by this date and has yet to file any documents in this matter.

On November 7, 2014, Chief Administrative Law Judge Peter M. Davenport [hereinafter "Chief Judge Davenport"] issued an order directing the parties to show cause as to why a default decision and order should not be entered ("Show Cause Order").² Complainant filed its "Response to 'Show Cause Order'" on November 24, 2014, along with its "Motion for Adoption

¹ The Rules of Practice provide that when a complaint "is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address." 7 C.F.R. § 1.147(c)(1). Therefore, Respondent Hay was effectively served on August 13, 2014.

² The Show Cause Order directed the parties to comply "no later than fifteen days of the date of [the] Order" (Show Cause Order at 2).

of Decision and Order by Reason of Default” and Proposed Decision and Order. All three Respondents failed to respond to the Show Cause Order.

On December 15, 2014, Chief Judge Davenport reassigned this case to my docket. On December 18, 2014, I entered an Order Resending Filings in which I: (1) directed that the Show Cause Order and Complainant’s Motion for Entry of Default be re-sent to Respondent Schooler via both regular and certified mail; (2) directed that the Show Cause Order and Complainant’s Motion for Entry of Default be re-sent to Respondent Hay via regular mail at his last known address of record;³ and (3) granted Respondents twenty-one days to show cause as to why default should not be entered against them (Order Resending Filings). All three Respondents failed to respond to my Order. On December 8, 2015, Complainant filed with the Hearing Clerk a “Request for Ruling on Complainant’s Motion for Decision and Order by Reason of Default.”

II. Statutory and Regulatory Authority

“It is well established that the Rules of Practice, 7 C.F.R. § 1.130 *et seq.*, rather than the Federal Rules of Civil Procedure apply to adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act.”⁴ Pursuant to the Rules of Practice, a respondent is required to file an Answer within twenty (20) days after service of a Complaint. 7 C.F.R. § 1.136(a). The Rules also provide that an answer “shall . . . [c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent.” 7 C.F.R. § 1.136(b)(1). The failure to timely file an answer or failure to deny or otherwise respond to an allegation proffered in the Complaint shall be deemed admission of all

³ I required that the Show Cause Order and Complainant’s Motion be re-mailed to Respondent Hay as “there is no evidence that [he] acknowledged any filings sent to him by certified mail” (Order Resending Files).

⁴ Hamilton, 64 Agric. Dec. 1659, 1662 (U.S.D.A. 2005) (internal citations omitted); *see* Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (U.S.D.A. 1999) (“The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.”).

the material allegations in the Complaint; in such situation, default shall be appropriate.⁵ 7

C.F.R. § 1.136(c).

Additionally, the Rules of Practice prescribe that, when computing the time permitted for a party to file a document or other paper, Saturdays, Sundays, and Federal holidays are to be included except when the time expires on one of those days; should such situation occur, the time period shall be extended to include the next business day. 7 C.F.R. § 1.147(h). The Rules also state that a document sent by the Hearing Clerk “shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail. . .” 7 C.F.R. § 1.147(c)(1).

Further, the Animal Welfare Act grants USDA the authority to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals subject to the Act. 7 U.S.C. § 2131. The AWA also authorizes the Secretary of USDA to promulgate appropriate rules, regulations, and orders to promote the purposes of the Act. 7 U.S.C. § 2151. Pursuant to the AWA, persons who sell and transport regulated animals are required to obtain a license or registration issued by the Secretary. 7 U.S.C. § 2133. The Act and Regulations fall within the enforcement authority of APHIS, an agency of USDA tasked to regulate and inspect AWA licensees to determine compliance with the AWA.

The AWA provides that sanctions may be imposed for violations of the Act. *See* 7 U.S.C. § 2149. Sanctions may include civil penalties of up to \$10,000 per violation, license suspension or revocation, and an order to cease and desist from further violating the Act. 7 U.S.C. § 2149(b).

⁵ *See* *Morrow v. Dep’t of Agric.*, 65 F.3d (West) 168 (6th Cir. 1995) (per curiam) (unpublished disposition) (“7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer Furthermore, the failure to answer constitutes the waiver of the right to a hearing.”) (internal citations omitted).

III. Discussion

A. Whether Default Without Hearing Is Appropriate

Default judgment is appropriate in the present case as Respondent Hay has failed to file an answer and is therefore deemed to have admitted all material allegations of the Complaint. As previously discussed, the record reflects that service was effected upon Respondent Hay on August 13, 2014. Thus, Respondent Hay had until September 2, 2014—twenty days after service of the Complaint—to file an answer. *See* 7 C.F.R. § 1.136(a). Respondent Hay has yet to file any documents in this matter.

Accordingly, I find that Respondent Hay has admitted the gravamen of Complainant's allegations, thereby obviating the need for a hearing in this case. The material allegations of the Complaint are therefore adopted as findings of fact, and I find it appropriate to enter a decision on the record by reason of default.

This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

B. Violations of the Act

It is evident that Respondent Hay violated the Regulations and Standards issued under the Animal Welfare Act. As discussed in the foregoing paragraphs, Respondent Hay failed to timely file an answer to the Complaint and is hence deemed, for purposes of the present proceeding, to have admitted "no fewer than 32 violations of the AWA regulations" (Mot. for Adoption of Proposed Decision at 2).⁶ These were "egregious, obvious violations" that not only "substantially

⁶ *See* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814, 821 (11th Cir. 2009)) (unpublished) (holding that Judicial Officer was correct in finding that respondent had willfully violated the Act on basis that respondent's "failure to answer or otherwise respond to the Complaint" constituted admission of all material allegations); Drogosch, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004) ("Respondent, by his failure to file a timely answer to the Complaint, is deemed to have admitted the violations of the Regulations and Standards alleged in the Complaint."); Hardin Cnty. Stockyards, Inc., 53 Agric. Dec. 654, 656 (U.S.D.A. 1994) ("... as respondent did not deny the

endangered the health and well-being of the animals” but resulted in the deaths of all fourteen animals—that is, fourteen dogs traveling to Afghanistan to be used in explosives and narcotics detection by the Department of Defense (Compl. ¶ 4).⁷

C. Sanctions

Complainant maintains that Respondent Hay committed, at minimum, thirty-two violations of AWA Regulations and thereby requests that I: (1) issue a cease-and-desist order against Respondent Hay; and (2) assess Respondent Hay a civil penalty of \$68,600.00 (Mot. for Adoption of Proposed Decision at 2). Complainant asserts that “[t]hese sanctions are appropriate in light of the gravity of the violations” (Mot. for Adoption of Proposed Decision at 2). Upon careful review of the documents and arguments submitted by the parties, I find that Complainant’s proposed sanctions in this case are warranted.

The Department’s sanction policy is set forth in *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (U.S.D.A. 1991) (Decision as to James Joseph Hickey & Shannon Hansen), *aff’d*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

S.S. Farms Linn County, Inc., 50 Agric. Dec. at 497. “In assessing penalties, the Secretary is required to give due consideration to *the size of the business involved, the gravity of the violation, the person’s good faith, and the history of previous violations.*” *Roach*, 51 Agric. Dec. 252, 264 (U.S.D.A. 1992) (emphasis added); 7 U.S.C. § 2149(b). The purpose of assessing

allegations in the complaint, that he engaged in the conduct alleged to be prohibited, he is found to have willfully violated the Act.”).

⁷ Pearson, 2007 WL 3170312, at *22-*23 (U.S.D.A. 2007), *aff’d*, 411 Fed. App’x 866 (6th Cir. 2011).

sanctions is not to punish violators but to deter future similar behavior by the violator and others.

Zimmerman, 57 Agric. Dec. 1038, 1064 (U.S.D.A. 1998).⁸

Among the “many discretionary sanctions” that the Secretary may impose “for remedial purposes in enforcing the Animal Welfare Act” are civil penalties and cease-and-desist orders.

Baird, 57 Agric. Dec. 127, 177 (U.S.D.A. 1998). The Act provides:

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale . . . that violates any provisions of this [Act], or any rule, regulation, or standard promulgated by the Secretary thereunder, *may be assessed a civil penalty by the Secretary of not more than \$10,000 for each violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation.* Each violation and each day during which a violation occurs shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary’s order with the appropriate United States Court of Appeals.

7 U.S.C. § 2149(b) (emphasis added). The Secretary may assess civil penalties and issue cease-and-desist orders against intermediate handlers and carriers “even if those persons were not Animal Welfare Act licensees at the time that they violated the Animal Welfare Act or the Regulations.” *Knapp*, 72 Agric. Dec. 766, 778 (U.S.D.A. 2013) (Order Den. Am. Pet. for Recons.).

Additionally, “[t]he administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry.” *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. Nevertheless, an administrative official’s recommendation is not controlling; in appropriate cases, the sanction imposed may be considerably less than or different from what is

⁸ See also *Chandler*, 64 Agric. Dec. 876, 894 (U.S.D.A. 2005) (“The purpose of an administrative sanction is not to punish one who may have violated governmental regulations; the purpose is instead to take such steps as are necessary to deter the Respondent from future conduct prohibited by the Act.”).

recommended. *Shepherd*, 57 Agric. Dec. 242, 283 (U.S.D.A. 1998). “An agency’s choice of sanction is not to be overturned unless it is unwarranted in law or without justification in fact.” *Cox v. U.S. Department of Agriculture*, 925 F.2d 1102, 1106 (8th Cir. 1991) (citations omitted).

The proposed sanctions are appropriate in the present case as Respondent Hay committed at least thirty-two very serious violations of the AWA and Regulations. At the time that the violations occurred, Indian Creek had approximately five to nine employees and generated \$500,000 to \$1,000,000 in annual revenue (Compl. ¶ 5). Although I consider Indian Creek to be a relatively small business, I find that the gravity of its violations—and, by extension, Respondent Hay’s violations—was great and resulted in the deaths of fourteen dogs. Further, Respondent Hay has not shown good faith. Despite having represented to Hill Country Dog Center that he and Thomas Schooler (AWA Docket No. 14-0150) would care for the dogs overnight in Indian Creek’s facility, Respondent Hay held the dogs in their crates, inside the closed transport truck, for thirteen hours without observation or adequate ventilation. While Respondent Hay has no individual record of previous violations of the Animal Welfare Act, Indian Creek received an Official Warning for its mishandling of a dog in 2008 (Compl. ¶ 3).

Complainant seeks an assessment of a \$68,600 civil penalty and an order requiring Respondent Hay to cease and desist from violating the AWA and Regulations. I find the Administrator’s recommendations to be more than reasonable, as Respondent Hay could be assessed civil penalties of up to \$320,000 for his thirty-two violations.⁹ After examining the relevant circumstances in light of the Department’s sanction policy and observing the remedial purposes of the Animal Welfare Act and recommendations of APHIS officials, I conclude that a \$68,600 civil penalty and cease-and-desist order are appropriate in this case. I regard these sanctions necessary “to ensure Respondent’s compliance with the Animal Welfare Act and the

⁹ The Secretary may assess a civil penalty of “not more than \$10,000” for each violation. 7 U.S.C. § 2139(b).

Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.” *Drogosch*, 63 Agric. Dec. 623, 644 (U.S.D.A. 2004).

Based on the foregoing, I hereby issue the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

1. Respondent Kyle Hay is an individual whose last known mailing address is in Texas.
2. At all times mentioned in the Complaint, Respondent Hay was: (1) acting for or employed by a carrier (Indian Creek, AWA Docket No. 14-0149) and/or its subsidiary; and (2) his acts, omissions, or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures as well as the acts, omissions, or failures of Indian Creek.
3. The gravity of the violations alleged herein is great. On December 20, 2010, Respondent Indian Creek accepted fourteen dogs from Hill Country Dog Center for transportation on KLM flight 662.¹⁰ The dogs had been purchased by American K-9 Detection Services, Inc. and were scheduled to travel from Houston, Texas via the Netherlands to Kandahar Air Field, Afghanistan to be used in the detection of explosives and narcotics by the Department of Defense, Department of the Army. The dogs were not boarded on KLM flight 662 on December 20, 2010; rather, they were required to remain in Houston overnight and were booked on KLM flight 662 to depart the following day. Respondents, including Respondent Hay, did not unload the dogs from the primary conveyance (a transport truck); they instead held the dogs overnight in their crates, inside the closed

¹⁰ Originally, fifteen dogs were delivered to Respondent Indian Creek for travel to Afghanistan. One dog was returned to Hill Country Dog Center because its handler had not yet deployed to Afghanistan (Proposed Decision & Order at 2).

truck, without observation or adequate ventilation for thirteen hours. All fourteen dogs had died by the next morning. APHIS determined that the dogs died from asphyxiation.

4. Respondent Hay has not shown good faith. Respondent Hay represented to Hill Country Dog Center that he and Thomas Schooler (AWA Docket No. 14-0150) would care for the fourteen dogs overnight in Indian Creek's facility (rather than in the transport truck).
5. On or about December 20, 2010 and December 21, 2010, Respondent Hay failed to handle fourteen dogs as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, physical harm, or unnecessary discomfort.
6. On or about December 20, 2010 and December 21, 2010, Respondent Hay failed to meet the minimum Standards as follows:
 - a. The animal cargo space of the primary conveyance used to transport and house fourteen dogs was not maintained in a manner that at all times protected the health and well-being of the dogs, ensured their safety and well-being, and prevented the entry of engine exhaust.
 - b. The animal cargo space of the primary conveyance used to transport and house fourteen dogs did not have a supply of air that was sufficient to enable the fourteen dogs to breathe normally while inside the conveyance.
 - c. Respondent Hay failed to position primary enclosures for the fourteen dogs in the primary conveyance in a manner that allowed the dogs to be removed quickly and easily from the primary conveyance.
 - d. Respondent Hay failed to ensure that each of the fourteen dogs in his custody was observed as often as circumstances allowed, but not fewer than once every four hours, to ensure that the dogs had sufficient air for normal breathing,

that the ambient temperature was within the limits provided in 9 C.F.R. § 3.15(e), and that the dogs were not in obvious physical distress or in need of veterinary care.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. On or about December 20, 2010 and December 21, 2010, Respondent Hay violated section 2.131(b)(1) of the Regulations, 9 C.F.R. § 2.131(b)(1), by failing to handle fourteen dogs as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, physical harm, or unnecessary discomfort.
3. On or about December 20, 2010 and December 21, 2010, Respondent Hay violated section 2.131(e) of the Regulations, 9 C.F.R. § 2.131(e), by failing to take appropriate measures to alleviate the impact of climatic conditions that represented a threat to fourteen dogs, and by subjecting fourteen dogs to a combination of temperature, humidity, and time that was detrimental to the dogs' health and well-being.
4. On December 20, 2010 and December 21, 2010, Respondent Hay violated section 2.100(b) of the Regulations, 9 C.F.R. § 2.100(b), by failing to meet the minimum Standards as follows:
 - a. The animal cargo space of a primary conveyance used to transport and house fourteen dogs was not maintained in a manner that at all times protected the health and well-being of the dogs, ensured their safety and well-being, and prevented the entry of engine exhaust. 9 C.F.R. § 3.15(a).
 - b. The animal cargo space of the primary conveyance used to transport and house fourteen dogs did not have a supply of air that was sufficient to enable the

fourteen dogs to breathe normally while inside the conveyance. 9 C.F.R. § 3.15(b).

- c. Respondent Hay failed to position primary enclosures for fourteen dogs in the primary conveyance in a manner that allowed the dogs to be removed quickly and easily from the primary conveyance. 9 C.F.R. § 3.15(f).
- d. Respondent Hay failed to ensure that each of the fourteen dogs in his custody was observed as often as circumstances allowed, but not fewer than once every four hours, to ensure that the dogs had sufficient air for normal breathing, that the ambient temperature was within the limits provided in 9 C.F.R. § 3.15(e), and that the dogs were not in obvious physical distress or in need of veterinary care. 9 C.F.R. § 3.17(a).

ORDER

1. Respondent Kyle Hay, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violation the Animal Welfare Act and the Regulations and Standards.
2. Respondent Kyle Hay is assessed a civil penalty of \$68,600, which shall be payable to the Treasurer of the United States.
3. This Decision and Order shall have the same effect as if entered after a full hearing.
4. The provisions of this Order shall become effective on the first day after this Decision becomes final. Pursuant to the Rules of Practice, this Decision shall become final without further proceedings thirty-five (35) days after the date of service upon Respondent Hay, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days of service. 7 C.F.R. §§ 1.139, 1.145(a).

5. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

SO ORDERED this 15th day of March, 2016 at Washington, D.C.


Janice K. Bullard
Administrative Law Judge